

EVIDENCE — DISCOVERY — WILLITS — *Willits* instruction cures any defect if State did not act in bad faith in destroying evidence — Revised 3/2010

State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964), requires trial judges to instruct juries that if they find that the State has lost, destroyed or failed to preserve material evidence that might aid the defendant and they find the explanation for the loss inadequate, they may draw an inference that the evidence would have been unfavorable to the State. In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the State failed to preserve potentially exculpatory evidence, so Youngblood asked for, and received, a *Willits* instruction at his trial. However, Youngblood argued on appeal that the State's failure to preserve that potentially exculpatory evidence violated his federal due process rights and required dismissal. The Arizona courts reversed Youngblood's conviction on due process grounds. However, the United States Supreme Court upheld Youngblood's conviction, holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58.

Youngblood returned to Arizona and argued that even though his federal due process rights had been preserved, the Arizona standard of due process was higher than the federal standard and still required dismissal for the State's failure to preserve the potentially exculpatory evidence. The Arizona Supreme Court disagreed. In *State v. Youngblood*, 173 Ariz. 502, 506-07, 844 P.2d 1152, 1156-57 (1993), the Arizona Supreme Court ruled that when there is no bad faith conduct on the part of the State, a *Willits* instruction is sufficient to satisfy the requirements of Arizona due process:

With respect to evidence which *might* be exculpatory, and where there is no bad faith conduct, the *Willits* rule more than adequately complies with

the fundamental fairness component of Arizona due process. . . . [T]he core of the [*Willits*] doctrine as it relates to Arizona due process is that an instruction is adequate where the state destroys, loses or fails to preserve evidence unless the state acts in bad faith or the defendant suffers prejudice-in-fact.

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Where the nature of the evidence -- exculpatory, inculpatory, or neutral -- is unknown, as in these cases, there can be no showing of prejudice in fact. Thus, only a showing of bad faith implicates due process.

Youngblood, 173 Ariz. at 507, 844 P.2d at 1157. The Court reasoned that because there was no evidence of bad faith in *Youngblood*'s case, dismissal was not appropriate:

When a *Brady*¹ violation results only in a new trial, it would be bizarre to suggest that, because of a non-malignant fortuity, fundamental fairness would require the dismissal of the charges. The *possibility* of prejudice is not sufficient to justify the ultimate sanction -- an order of dismissal. See *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 656, 88 L.Ed.2d 640 (1986). Instead, the defendant gets more than the process due with a *Willits* instruction. "The touchstone of due process under both the Arizona and federal constitutions in fundamental fairness." *State v. Melendez*, 172 Ariz. 68, 71, 834 P.2d 154, 157 (1992).

We therefore hold that absent bad faith on the part of the state, the failure to preserve evidentiary material which could have been subjected to tests, the results of which might have exonerated the defendant, does not constitute a denial of due process of law under the Arizona Constitution.

Id. at 507-08, 844 P.2d at 1157-58.

¹*Brady v. Maryland*, 373 U.S. 83 (1963).